Supreme Court, U.S.
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No. 85-1067

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

BEN M. HOGAN COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a jury instruction, to which timely and specific objection was made, containing an erroneous, conclusive and mandatory presumption with respect to the interstate commerce element of a Sherman Act charge may constitute harmless error.

TABLE OF CONTENTS

	Pages
Question Presented	i
Opinion Below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Pages

CASES:

Carpenters and Joiners v. United States, 330 U.S. 395 5

Chapman v. California, 386 U.S. 18 5

Connecticut v. Johnson, 460 U.S. 73 5

Francis v. Franklin, — U.S. —, 105 S.Ct. 1965 ..... 4, 6

Jackson v. Virginia, 443 U.S. 307 5

Rose v. Clark, cert. granted, No. 84-1974 (Oct. 7, 1985) 4, 5, 7

Sandstrom v. Montana, 442 U.S. 510 ..... 4, 5, 6

STATUTES:

Sherman Act, 15 U.S.C. § 1 2

18 U.S.C. § 1341 2

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OPINION BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 1293.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1985. A petition for rehearing was denied on September 20, 1985. On November 14, 1985, Justice Black-

mun extended the time within which to file a petition for a writ of certiorari to and including December 19, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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STATEMENT

Respondent was convicted of conspiring to rig bids on three highway construction projects let by the Arkansas State Highway and Transportation Department. Respondent was convicted of one count of bid rigging in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and three counts of mail fraud, 18 U.S.C. § 1341. Respondent was fined $800,000.00 on the bid rigging count and $1,000.00 on each of the three mail fraud counts. The Court of Appeals reversed only on the bid rigging count. The Court found that an instruction mandating a conclusive presumption that bid rigging constitutes a restraint on interstate commerce, an essential element of the offense, deprived the defendant of a right so basic that it could not be deemed harmless.

Respondent specifically objected to the offensive instruction on the ground that "it would essentially relieve the government from its obligation of proving interstate commerce" and take "the interstate commerce issue away from the jury" (5 Tr. 394). The trial court immediately overruled the objection (5 Tr. 396) which was made prior to closing argument and prior to the conclusion of the instruction conference. Only after the trial court ruled it would instruct the jury that an effect on interstate commerce was conclusively presumed from bid rigging did

respondent recognize the futility of continuing to argue the interstate element of the offense. Therefore, respondent abandoned plans to proffer several modifications to the interstate commerce instructions and plans to argue this issue to the jury.

Contrary to petitioner's representation (Pet. 4), respondent did contest the government's evidence of the interstate commerce element of the Sherman Act offense. Prior to trial respondent moved to dismiss the indictment on the ground that it failed to allege the requisite effect on interstate commerce (R. 143-145). Respondent cross-examined concerning interstate commerce (e.g. 2 Tr. 152-155) and in its motion for judgment of acquittal both at the conclusion of the petitioner's case and at the conclusion of all of the evidence contested the sufficiency of the evidence on this issue (3 Tr. 164; 5 Tr. 367).

Petitioner's evidence that the alleged conspirators' activities were in or affected interstate commerce consisted of testimony that federal revenue sharing funds had been used to pay for the three highway construction projects (2 Tr. 134-140); that one of the alleged co-conspirators had purchased in the preceding year heavy equipment manufactured out of state which was used on the highway construction projects (2 Tr. 149-151; 3 Tr. 160-162); and that the three projects involved construction on highways which interconnect with other highways which are part of the interstate highway system (1 Tr. 77-78).

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ARGUMENT

Petitioner suggests that this petition presents the same question as is presented in *Rose v. Clark*, No. 84-1974 (Pet. 9) and that this Court should hold this petition for disposition in light of a decision in *Rose v. Clark*. The question presented in *Rose v. Clark* involves a jury instruction creating a rebuttable presumption, while in this case the jury instruction contained a mandatory conclusive presumption.

The petitioner here concedes in *Rose v. Clark* that depriving a criminal defendant of a jury trial could never be harmless even if the bench trial he received was otherwise fair and reliable (Brief 11). Petitioner here also concedes in *Rose v. Clark* that *Sandstrom* error can sometimes be grave enough that it is reasonable to say that a defendant's right to have his guilt determined by the jury has been defeated (Brief 14). In *Rose v. Clark* the principal argument of the petitioner here is that the rebuttable nature of the presumption is significant in determining whether or not the presumption is the equivalent of a directed verdict on an element of the offense (Brief 15).[1]

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[1]A mandatory presumption may be either conclusive or rebuttable. Conclusive presumptions eliminate the presumed element from the trial once there is proof of the predicate facts which give rise to the presumption. A rebuttable presumption does not remove the presumed element from the trial, but rather, requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is not warranted, *Francis v. Franklin*, — U.S. —, — at fn. 2, 105 S.Ct. 1965, 1971 fn.2 (1985). A rebuttable presumption shifts the burden of proof to the defendant, while an irrebuttable presumption eliminates an element from jury consideration once the predicate facts are proven, *Francis v. Franklin*, id at fn.5.

This Court's prior decisions in *Sandstrom v. Montana*, 442 U.S. 510 (1979), *Connecticut v. Johnson*, 460 U.S. 73 (1983) and *Francis v. Franklin*, 105 S. Ct. 1965 (1985) also distinguish between instructions containing a mandatory conclusive presumption and those which contain a rebuttable presumption concerning an essential element of the offense. This Court's prior plurality opinion in *Connecticut v. Johnson*, 460 U.S., and the petitioner's amicus brief in *Rose v. Clark* suggest that a mandatory conclusive presumption on an element of the offense has the effect of depriving a defendant of a jury trial. That right is so basic to a fair trial that its absence can never be treated as harmless error, *Chapman v. California*, 386 U.S. 18, 23 (1967). A mandatory conclusive presumption prevents a jury from considering an issue more effectively than a failure to instruct a jury on the requirement of proof of guilt beyond a reasonable doubt. Such failure can never be harmless error. *Jackson v. Virginia*, 443 U.S. 307, 320, fn.14 (1979).

When a trial court directs the jury to return a verdict of guilty, the resulting error is the functional equivalent of the denial of a jury trial, *Carpenters and Joiners v. United States*, 330 U.S. 395, 408-409 (1947). A mandatory conclusive presumption directs the jury to find the element of the offense to which the instruction relates and is the functional equivalent of denying defendant the right to a jury trial. In this case the trial court, over objection, instructed the jury, in essence, that bid rigging constitutes an unreasonable restraint on interstate commerce, one of the elements of the offense. That element of the offense was contested by respondent until the Court advised the parties of the instructions it would give.

By finding *Sandstrom* error in this case, the Court of Appeals necessarily concluded that it was not possible to determine with certainty that the jury had not applied the mandatory conclusive presumption as a directed verdict on the interstate commerce element of the offense. Cf. *Sandstrom v. Montana,* 442 U.S. at 514. The existence of *Sandstrom* error depends upon whether a court can find with certainty (442 U.S. 510, 526) that the jury did not apply the conclusive presumption as a directed verdict. Once a *Sandstrom* error is found, it is inconsistent for a Court to thereafter conclude beyond a reasonable doubt that a defendant was not denied his right to a trial by jury, a right so basic that its denial can never be harmless. No quantum of evidence can compensate for such an erroneous mandatory conclusive presumption.

Because jurors are usually conscientious about following instructions, it is likely that a jury will follow a mandatory conclusive presumption rather than undertake the more difficult task of evaluating evidence concerning the element of the offense the jury is instructed to conclusively presume, *Sandstrom v. Montana,* id. at 526, n. 13. It is also reasonable to expect a juror to attempt to make sense of a confusing earlier portion of an instruction by reference to a later portion of the instruction, *Francis v. Franklin,* 105 S. Ct. at fn. 7.

Once a mandatory conclusive presumption on an essential element of the offense results in a directed verdict with respect to that element, an appellate court's confidence in the integrity of the verdict is necessarily undermined because the error is likely to affect the outcome in every case in a manner not susceptible to effective review. Any such review must not only involve an appel-

late court substituting its judgment for that of the jury of which the defendant has been deprived, but must also require the appellate court to speculate about the effect of the mandatory conclusive presumption on the conduct and offense determined by the jury.

The question presented by this petition is different from the question presented in *Rose v. Clark* and very likely will not be governed by its disposition. Thus petitioner's effort here, not to obtain plenary review of the decision of the court below but to hold this case in judicial limbo while the Court considers a case involving a different question, is contrary to the basic concept governing the exercise of certiorari jurisdiction—that is, to decide important questions of federal law which have not been, but should be, settled by this Court. See Supreme Court Rule No. 17. There is a substantial probability that the disposition of *Rose v. Clark* will not decide the issue presented here, and remand of this case following such disposition would simply present the court below with the obligation to make yet another assessment of a question that has already had plenary consideration there.

Petitioner has an abundant arsenal for the pursuit of its prosecutorial powers. The device it seeks to employ here, to put other prosecutions "on hold" pending disposition of remotely related questions by this Court in proceedings to which the defendants in the other cases are not privy (but petitioner is), is fundamentally unfair and should be sanctioned by this Court sparingly, if at all.

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CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court should grant the petition and give plenary consideration to the question presented.

Respectfully submitted,

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